

A. The State's causation evidence is entirely consistent with the law

The Cal-Maine Defendants' and George's Defendants' assertion that the State is attempting to assign liability on the basis of "industry-wide or commodity-based 'nonidentification' or collective liability theories" reflects a fundamental misapprehension of the nature of the State's claims and how the State will prove those claims. The State's claims arise from and are based upon an indivisible injury caused in part by the individual conduct of both the Cal-Maine Defendants and the George's Defendants.² Both the Cal-Maine Defendants and the George's Defendants are causal actors. The evidence shows that (1) the Cal-Maine Defendants and the George's Defendants have each housed significant numbers of birds in the IRW, (2) the Cal-Maine Defendants' birds and the George's Defendants' birds both have generated significant amounts of poultry waste, (3) the majority of the poultry waste from the Cal-Maine Defendants' birds and the George's Defendants' birds has been land applied in the IRW, (4) some amount of *all* land applied poultry waste -- including that of the Cal-Maine Defendants and the George's Defendants -- runs off to the waters of the IRW, and (5) phosphorus and bacteria in this run-off has combined with other phosphorus and bacteria to cause an indivisible injury to the State. *See* DKT #2062.

As explained in State's Response to Defendants' Motion for Partial Summary, *see* DKT #2182, when multiple tortfeasors' acts concur, combine, or commingle to produce an indivisible injury, they may be held jointly and severally liable even in the absence of concerted action. *See Boyles v. Oklahoma Natural Gas*, 619 P.2d 613, 617 (Okla. 1980). "With respect to

² That the Cal-Maine Defendants and the George's Defendants both resort to a securities case, *In re Williams Securities Litigation*, 558 F.3d 1130 (10th Cir. 2009), and two product liability / negligence cases, *Wood v. Eli Lilly & Co.*, 38 F.3d 510 (10th Cir. 1994) & *Case v. Fibreboard*, 743 P.2d 1062 (Okla. 1987), as the basis for their argument simply underscores just how far off the mark their analysis of causation really is.

environmental nuisances, such as pollution of a stream or pollution of the air surrounding a community, courts have commonly found that such pollution constitutes an indivisible injury." *Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27381, at *41 (N.D. Okla. July 11, 2003), *vacated in part by Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004) (citing *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995); *Harper-Turner Oil Co.*, 311 P.2d at 950-51; *U.S. v. Pess*, 120 F. Supp. 2d 503 (W.D. Pa. 2000)).

This indivisible injury rationale has been repeatedly applied by Oklahoma courts in pollution cases. In *Union Tex. Petroleum*, the Oklahoma Court of Civil Appeals held that the defendants were jointly and severally liable for an indivisible injury contaminating an aquifer underlying the town of Cyril. In this regard, the Court reasoned:

The single, indivisible injury at issue in this case is the contamination of the town of Cyril's water supply by saltwater used in oil and gas operations. The general rule is that where several persons are guilty of separate and independent acts of negligence which combine to produce directly a single injury, the courts will not attempt to apportion the damage, especially where it is impracticable to do so, but will hold each joint tort-feasor liable for the entire result.

909 P.2d at 149-50. The "indivisible injury" doctrine applies in this case, just as Chief Judge Eagan applied it in *City of Tulsa v. Tyson Foods*:

The injury alleged herein is a single, indivisible injury - the eutrophication of the lakes from excess phosphorus loading. Under Oklahoma and Arkansas law, regardless of whether the claim is one of negligence or intentional tort, where there are multiple tortfeasors and the separate and independent acts of codefendants concurred, commingled and combined to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.

City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003), *vacated in connection with settlement* (citations and internal quotations omitted). In the *City of Tulsa* case, Chief Judge Eagan further determined that: (1) "plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant"; and (2) "plaintiffs must show that each

defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs." *Id.* at 1300.

Here, the State suffers a single, indivisible injury of contamination of the waters of the IRW caused by multiple tortfeasors whose separate and independent acts have combined to produce this harm. As such, the State "need not prove the portion or quantity of harm or damages caused by each particular defendant," nor must the State "track" bacteria or phosphorus from land application sites to surface or groundwater. The *Herd* decision is highly informative in this regard. In *Herd*, lead-laden dust blown from defendants' chat piles and tailings ponds commingled in the air and contaminated the community causing an indivisible injury. In denying the defendants' various motions for summary judgment regarding causation, this Court held:

Once the lead-laden dust reaches the air stream, it is impossible to trace its precise source. The Court therefore finds that the alleged injury is indivisible and that the . . . legal principles regarding joint and several liability apply. To the extent Defendants argue that they are entitled to summary judgment on grounds that Plaintiffs have failed to allege facts that 'trace' or 'quantify' the lead-laden dust causing the alleged nuisance in this case as to each individual Defendant's chat pile(s) or tailing pond(s), the Court finds that, under the facts present here, such tracing or quantification is not required.

Herd, 2003 U.S. Dist. LEXIS 27381, at *41-42.

The *Herd* court also rejected defendants' argument that plaintiffs could not show each defendant contributed to the nuisance:

The record before the Court indicates that Defendants collectively deposited over seventeen million tons of lead-laden mining waste in the Ottawa County area. Although these collective numbers are not conclusive as to any one Defendant's contribution, they clearly inform the issue of contribution, when combined with evidence of the location of Defendant's mining activities in relation to the Picher community. This case is not about a single particle from a chat pile that is miles away from Picher. Therefore, the Court finds that Plaintiffs have met the requisite threshold amount with respect to these Defendants.

Id. at *44-45. Finally, in summing up its opinion on causation, the *Herd* Court explained:

Based on (1) the proximity of the waste materials that resulted from each particular Defendants' mining activities to the alleged area of contamination; and (2) the evidence that will be offered regarding the air dispersion of lead-laden dust from these waste materials, the Court finds that a reasonable jury could conclude that the above-listed Defendants contributed to the nuisance. Thus, Plaintiffs' allegations are not merely 'you mined and therefore you caused the injury,' but instead 'you mined and left waste materials very near the contaminated community and such waste materials have been shown to contain the type of contamination that occurred in the community.' The Court does not view the latter claims as requiring a legally impermissible leap on the causation continuum.

Id. at 45-46. The *Herd* decision is on point. In this case, it is simply not possible for the State to trace or pinpoint the precise source of each molecule of phosphorus (or bacterium) that has made its way to the waters of the IRW. And, importantly, the State is not required to do so as a matter of law. The State has substantial evidence that *each* of the Defendants -- including the Cal-Maine Defendants and the George's Defendants -- has contributed to the pollution. This is all that is required.

B. The State's evidence demonstrates that the Cal-Maine Defendants and the George's Defendants have each contributed to the State's indivisible injury

The Cal-Maine Defendants' and the George's Defendants' assertion that the State "do[es] not have any evidence linking [Cal-Maine / George's] to [its] alleged injuries" is not true. The State's evidence clearly demonstrates that the Cal-Maine Defendants and the George's Defendants have each contributed to the pollution of the waters of the State. For example, and without limitation, the Cal-Maine Defendants' birds have generated tens of thousands of tons of poultry waste in the IRW, while the George's Defendants have generated hundreds of thousands of tons of poultry waste in the IRW. *See* DKT #2062 at Fact, ¶ 24. The vast majority of this poultry waste has been land applied in the IRW. *See* DKT #2062 at Fact, ¶¶ 28, 30 & 32. The geology of the IRW is such that there are ready pathways for the transport of poultry waste and

its constituents from the land on which it is spread to the surface and groundwater in the IRW. *See* DKT #2062 at Fact, ¶ 46. Poultry waste is the predominant source of phosphorus loading in the IRW. *See* DKT #2062 at Fact, ¶¶ 43-44. Some portion of land-applied poultry waste is *always* transported from fields to the water. *See* DKT #2062 at Fact, ¶ 48. Run-off from poultry waste is causing injury to the waters of the State. *See* DKT #2062 at Fact, ¶¶ 48-52. This evidence is more than adequate under the indivisible injury doctrine for the purposes of establishing causation with respect to the Cal-Maine Defendants and the George's Defendants.

Conclusion

WHEREFORE, the State's Motion for Partial Summary Judgment (DKT #2062) should be granted against the Cal-Maine Defendants and the George's Defendants.

Respectfully submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page, OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

/s/ Louis W. Bullock
Louis W. Bullock, OBA #1305

Robert M. Blakemore, OBA #18656
BULLOCK BULLOCK & BLAKEMORE
110 West 7th Street, Suite 707
Tulsa, OK 74119-1031
(918) 584-2001

Frederick C. Baker (*pro hac vice*)
Elizabeth C. Ward (*pro hac vice*)
Elizabeth Claire Xidis (*pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold (*pro hac vice*)
Ingrid L. Moll (*pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent (*pro hac vice*)
Michael G. Rousseau (*pro hac vice*)
Fidelma L. Fitzpatrick (*pro hac vice*)
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

**ATTORNEYS FOR PLAINTIFF,
STATE OF OKLAHOMA**

CERTIFICATE OF SERVICE

I certify that on the 19th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W.A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Atty General
OFFICE OF THE ATTORNEY GENERAL , STATE OF OKLAHOMA

fc_docket@oag.ok.gov
kelly.burch@oag.ok.gov

M. David Riggs
Joseph P. Lennart
Richard T. Garren
Sharon K. Weaver

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com

Robert A. Nance
D. Sharon Gentry
David P. Page
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

rnance@riggsabney.com
sgentry@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Robert M. Blakemore
BULLOCK BULLOCK & BLAKEMORE

lbullock@bullock-blakemore.com
bblakemore@bullock-blakemore.com

Frederick C. Baker
William H. Narwold
Elizabeth C. (Liza) Ward
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC
COUNSEL FOR PLAINTIFF, STATE OF OKLAHOMA

fbaker@motleyrice.com
bnarwold@motleyrice.com
lward@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

Robert P. Redemann
David C. Senger
PERRINE, McGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
david@cgmlawok.com

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS
COUNSEL FOR DEFENDANT CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

John H. Tucker
Kerry R. Lewis
Colin H. Tucker
Theresa Noble Hill
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com
klewis@rhodesokla.com
chtucker@rhodesokla.com
thill@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Christopher H. Dolan
Melissa C. Collins
Colin C. Deihl
Randall E. Kahnke
FAEGRE & BENSON LLP

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
twalker@faegre.com
cdolan@faegre.com
mcollins@faegre.com
cdeihl@faegre.com
rkahnke@faegre.com

Dara D. Mann dmann@mckennalong.com
McKENNA, LONG & ALDRIDGE LLP
COUNSEL FOR DEFENDANT CARGILL, INC. and CARGILL TURKEY PRODUCTION, LLC

George W. Owens gwo@owenslawfirmnpc.com
Randall E. Rose rer@owenslawfirmnpc.com
OWENS LAW FIRM, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K.C. Dupps Tucker kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick bchadick@bassettlawfirm.com
BASSETT LAW FIRM
COUNSEL FOR DEFENDANT GEORGE'S INC. AND GEORGE'S FARMS, INC.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip D. Hixon phixon@mhla-law.com
Craig A. Mirkes cmirkes@mhla-law.com
McDANIEL HIXON LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsqw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR DEFENDANT PETERSON FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
CONNER & WINTERS, LLP
COUNSEL FOR DEFENDANT SIMMONS FOODS, INC.

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Timothy T. Jones tim.jones@tyson.com
TYSON FOODS INC

Michael R. Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
Dustin Darst dustin.darst@kutakrock.com
Tim Jones tim.jones@kutakrock.com
KUTAK ROCK LLP

Stephen Jantzen sjantzen@ryanwhaley.com
Paula Buchwald pbuchwald@ryanwhaley.com
Patrick M. Ryan pryan@ryanwhaley.com
RYAN, WHALEY & COLDIRON

Mark D. Hopson mhopson@sidley.com
Timothy Webster twebster@sidley.com
Jay T. Jorgensen jjorgensen@sidley.com
Gordon D. Todd gtodd@sidley.com
SIDLEY AUSTIN LLP
COUNSEL FOR DEFENDANTS TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., and
COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Jennifer S. Griffin jgriffin@lathropgage.com
David Brown dbrown@lathropgage.com
Frank M. Evans III fevans@lathropgage.com
LATHROP & GAGE, L.C.
COUNSEL FOR DEFENDANT WILLOW BROOK FOODS, INC.

Robin S. Conrad rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER

Gary S. Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
COUNSEL FOR US CHAMBER OF COMMERCE AND AMERICAN TORT REFORM ASSOCIATION

D. Kenyon Williams, jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
COUNSEL FOR POULTRY GROWERS / INTERESTED PARTIES / POULTRY PARTNERS, INC.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY
COUNSEL FOR OKLAHOMA FARM BUREAU, INC.

Kendra A. Jones, Assistant Attorney General kendra.jones@arkansasag.gov
Charles L. Moulton, Sr. Ass't AG charles.moulton@arkansasag.gov
OFFICE OF THE ATTORNEY GENERAL, STATE OF ARKANSAS
COUNSEL FOR STATE OF ARKANSAS

Mia Vahlberg mvahlberg@gablelaw.com
GABLE GOTWALS

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
HOGAN & HARTSON
COUNSEL FOR NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASS'N AND NATIONAL TURKEY
FEDERATION

John D. Russell
William A. Waddell, Jr.
David E. Choate

jrussell@fellerssnider.com
waddell@fec.net
dchoate@fec.net

FELLERS SNIDER BLANKENSHIP BAILEY & TIPPENS P.C.
COUNSEL FOR ARKANSAS FARM BUREAU FEDERATION

Barry G. Reynolds
Jessica E. Rainey

reynolds@titushillis.com
jrainey@titushillis.com

TITUS HILLIS REYNOLDS LOVE DICKMAN & McCALMON

William S. Cox III
Nikaa B. Jordan

wcox@lightfootlaw.com
njordan@lightfootlaw.com

LIGHTFOOT FRANKLIN & WHITE LLC

COUNSEL FOR AMERICAN FARM BUREAU FEDERATION and NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AMICUS CURIAE

Richard Mullins
McAFEE & TAFT PC

richard.mullins@mcafeetaft.com

COUNSEL FOR TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSN, TEXAS PORK PRODUCERS ASSN, AND TEXAS ASSN OF DAIRYMEN

s/ Louis W. Bullock

Louis W. Bullock